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IN THE

Supreme Court of the United States

October Term, 1970
No. 299

PAUL ROBERT COHEN,

Appellant,

vs.

THE STATE OF CALIFORNIA,

Appellee.

Appeal From the Court of Appeal of California, Second Appellate District.

BRIEF OF APPELLEE.

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IN THE

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Appellee.

Appeal From the Court of Appeal of California, Second Appellate District.

BRIEF OF APPELLEE.

OPINIONS BELOW.

The Los Angeles Municipal Court did not issue a formal opinion when the appellant was "adjudged guilty as charged" on September 27, 1968 (A. 8). The Appellate Department of the Los Angeles Superior Court reversed the conviction on January 20, 1969 with a written unpublished opinion (A. 10-11). Upon rehearing, the Appellate Department of the Los Angeles Superior Court on May 23, 1969 again reversed the conviction with a written unpublished opinion (A. 13-17). The California Court of Appeal affirmed the judgment of conviction on October 22, 1969 with a written published opinion (A. 26-35) reported at 1 Cal. App. 3d 94, 81 Cal. Rptr. 503.

JURISDICTION.

Appellant invokes jurisdiction of this Court under Title 28, United States Code Section 1257(2). On June 22, 1970 this Court postponed the question of jurisdiction to a hearing on the merits.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are the First and Fourteenth Amendments of the United States Constitution.

The statutory provision involved is California Penal Code Section 415.

STATEMENT OF THE CASE.

Appellant was charged in a verified complaint filed in the Municipal Court of the Los Angeles Judicial District, with having violated California Penal Code Section 415. The complaint alleged that on April 26, 1968 the appellant "did wilfully and unlawfully and maliciously disturb the peace and quiet of the neighborhood of 110 North Grand and the peace and quiet of . . . persons then and there being present, by then and there, engaging in tumultuous and offensive conduct." (A. 1).

Appellant was duly arraigned and informed of the charge against him, whereupon he pleaded not guilty (A. 4). On September 27, 1968 the appellant waived his right to a jury trial (A. 6). The prosecution's case was presented as follows:

On April 26, 1968 the appellant was observed in the corridor of the Los Angeles County Courthouse outside of Division 20 of the Los Angeles Municipal

Court. The appellant was wearing a jacket bearing the words "Fuck the Draft." There were women and children present in the corridor. The appellant entered the courtroom where he removed the jacket and held it folded over his arm. When the appellant left the courtroom, he was placed under arrest. Though he had not written the words, the appellant was aware that the words "Fuck the Draft" were on his jacket. The appellant stated that by wearing the jacket the public was made aware of the depth of feeling against the draft shared by the appellant and his friends (A. 18-20).

The appellant was adjudged guilty as charged. He was sentenced to 30 days in the Los Angeles County Jail (A. 8).

An appeal was taken to the Appellate Department of the Los Angeles Superior Court. That court reversed the conviction on January 20, 1969 (A. 10-11). On petition of appellee the case was granted a rehearing (A. 12). The Appellate Department for a second time reversed the conviction on May 23, 1969 (A. 13-17). On petition of appellee the case was certified to the California Court of Appeal (A. 23-25). The Court of Appeal affirmed the conviction with a published opinion on October 22, 1969 (A. 26-35). Appellant's petition for hearing was denied by the California Supreme Court on December 17, 1969 (A. 36).

On February 20, 1969 the appellant filed a Notice of Appeal to the United States Supreme Court in the California Court of Appeal.

On June 22, 1970 this Court postponed consideration of the question of jurisdiction to the hearing of the case on the merits (A. 37).

ISSUES PRESENTED.

(1) The Court Lacks Jurisdiction to Review This Case.

(2) California Penal Code Section 415 is Constitutional

(3) Appellant's Conviction is not a violation of the First and Fourteenth Amendments.

I.

The Court Lacks Jurisdiction to Review This Case.

Appellant attempts to invoke the jurisdiction of this Court under Title 28 United States Code, Section 1257-(2). On June 22, 1970 this Court postponed the question of jurisdiction to the hearing of the case on the merits.

Appellee contends that this Court lacks jurisdiction in this case in that the basic issue considered by the California courts was the interpretation of the phrase "tumultuous or offensive conduct" contained in California Penal Code Section 415. This phrase was construed by the California Court of Appeal in a factual context.

The United States Supreme Court from the time of its inception has adhered to the principle that it will not review judgments of state courts which rest upon adequate and independent state grounds or nonfederal grounds. This Court is without jurisdiction to review holdings of the state courts, which concern matters of state law and amount at most to alleged erroneous construction of statutes of a state by its own courts [*Neblett v. Carpenter* (1938) 305 U.S. 297, 302, 83 L. Ed. 182, 187].

California Penal Code Section 415 contains the disjunctive phrase "tumultuous *or* offensive conduct." In conformity with California law (See: *People v. Ah Woo,* (1865) 28 Cal. 205, 212; *People v. O'Brien,* (1900) 130 Cal. 1, 3-4, 62 Pac. 297), the complaint herein, pleaded in the conjunctive so as to avoid uncertainty, alleged that the appellant engaged in "tumultuous *and* offensive conduct." (A. 1). The appellant was "adjudged guilty as charged." (A. 8). Merely because the complaint is phrased in the conjunctive does not prevent a trier of fact from convicting a defendant if the evidence proves only one of the alleged acts [*People v. McClennegen,* (1925) 195 Cal. 445, 452, 234 Pac. 91; *In re Bushman,* (1970) 1 Cal. 3d 767, 775, 83 Cal. Rptr. 375, 463 P. 2d 727].

In reversing the conviction, the Appellate Department of the Los Angeles Superior Court declared (A. 16):

> "It is our opinion that the Legislature did not intend to punish as distributing the peace 'offensive' conduct that was quiet and peaceful, but only that which was 'tumultuous'. Accordingly, we hold that the prohibition against engaging in 'tumultuous or offensive conduct' should be construed to read 'tumultuous *and* offensive conduct'."

The Appellate Department of the Los Angeles Superior Court certified the case to the California Court of Appeal because it appeared necessary to settle an important question of California law (A. 23).

In affirming appellant's conviction, the California Court of Appeal set forth the "Question Presented" to it: "Is offensive conduct which is not also tumultuous

punishable under Penal Code Section 415?" (A. 27). The Court of Appeal "by applying the law to the facts" determined this factual question adverse to appellant (A. 28).

The California Court of Appeal concluded that appellant's "acts constituted the type of offensive conduct prohibited by Section 415 in that it had a tendency to incite others to violent behavior or to disturb the peace." (A. 29). A similar construction of the statute was rendered by the California Supreme Court in *In re Bushman*, (1970) 1 Cal. 3d 767, 83 Cal. Rptr, 375, 463 P. 2d 727. It is a basic constitutional principle that construction of state laws is the exclusive responsibility of the state courts [*Speiser v. Randall*, (1958) 357 U.S. 513, 523, 2 L. Ed. 2d 1460, 1471].

The construction of a state statute by the highest court of the state fixes its meaning for the determination of its constitutionality by this Court, as if it had been amended by the California legislature [*Cramp v. Board of Public Instruction*, (1961) 368 U.S. 278, 285, 7 L. Ed. 2d 285, 291]. This Court must accept the California judicial construction of the statute [*Shuttelesworth v. Birmingham*, (1965) 382 U.S. 87, 91, 15 L. Ed. 2d 176, 180].

The California court has made a factual determination that appellant's conduct falls within the purview of California Penal Code Section 415. This Court is bound by a state's interpretation of its own statute. This Court may not substitute its judgment for that of the state when it becomes necessary to analyze the evidence for the purpose of determining whether it supports the findings of a state court. [*Garner v. Louisiana*, (1961) 368 U.S. 157, 166, 7 L. Ed. 2d 207,

215]. In reviewing a state conviction, issues of fact are for conclusive determination by the state courts and are not open for reconsideration by this Court. [*Watts v. Indiana,* (1949) 338 U.S. 49, 51, 93 L. Ed. 1801, 1804].

The California Court in construing the statute "found that the evidence was sufficient to support a conviction for disturbing the peace by means of offensive conduct as prohibited by Section 415 of the Penal Code." (A. 34). Clearly this was a *factual* determination as to the scope of California Penal Code Section 415.

The Appellant is asking this Court to review the California Court holding which concerns matters of California law. Appellant's arguments amount at most to an attack on the factual issues determined by the court and/or to an alleged erroneous construction of a California statute by its own courts. This Court is without jurisdiction to review these arguments.

Appellee contends that there was no substantial federal question involved, nor was a decision on a federal question necessary to the determination of the case by the California court.

II

California Penal Code Section 415 Is Constitutional.

> "Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood or person by loud or unusual noise, or *by tumultuous or offensive conduct,* or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town, or upon the public highways in

such unincorporated town, run any horse race, either for a wager or for amusement, or fire any gun or pistol in such unincorporated town, or use any vulgar, profane, or indecent language within the presence or hearing of women and children, in a loud and boisterous manner, is guilty of a misdemeanor, and upon conviction by any Court of competent jurisdiction shall be punished by fine not exceeding two hundred dollars, or by imprisonment in the County Jail for not more than ninety days, or by both fine and imprisonment, or either, at the discretion of the Court." California Penal Code Section 415.

The appellant was convicted of a disturbance of the peace in that he engaged in "offensive conduct". On January 27, 1970 the California Supreme Court in the case of *In re Bushman,* 1 Cal. 3d 767, 83 Cal. Rptr. 375, 463 P. 2d 727 reviewed the "tumultuous or offensive" conduct phrase of California Penal Code Section 415.

The California Supreme Court in *Bushman,* page 773, declared:

"Section 415 is not unconstitutionally vague and overbroad. It has a commonly understood meaning that not only affords adequate notice of the type of conduct that is proscribed, but also precludes its application to conduct protected by the First Amendment. The part of the section under which [*Bushman*] was convicted provides: 'Every person who maliciously and wilfully disturbs the peace or quiet of any . . . person . . . by tumultuous or offensive conduct . . . is guilty of a misdemeanor.' The terms 'disturb the peace'

and 'breach of the peace', which are substantially synonymous, have long been understood to mean disruption of public order by acts that are themselves violent or that tend to incite others to violence. Thus, one may be guilty of disturbing the peace within that part of Section 415 if he engages in 'tumultuous' conduct, i.e., violent conduct that wilfully and maliciously endangers public safety or order. *He may also be guilty of disturbing the peace through 'offensive' conduct if by his actions he wilfully and maliciously incites others to violence or engages in conduct likely to incite others to violence.* [*People v. Cohen* (1969) 1 Cal. App. 3d 94, 101 (81 Cal. Rptr. 503).]" (Emphasis supplied).

The California Supreme Court continued:

"The foregoing construction of Section 415 assures that conduct protected by the First Amendment's guarantee of freedom of speech is not made criminal. Unlike the city ordinance considered by the United States Supreme Court in *Terminiello v. Chicago* (1948) 337 J.S. 1 [93 L. Ed. 1131, 69 S.Ct. 894], that permitted conviction if one's speech 'stirred people to anger, invited public dispute, or brought about a condition of unrest' (337 U.S. 1, 5 [93 L.Ed. 1131, 1135, 69 S.Ct. 894]), or the statute considered by the court in *Cantwell v. Connecticut* (1939) 310 U.S. 296 [84 L. Ed. 1213, 60 S.Ct. 900, 128 A.L.R. 1352], that permitted conviction although there was no clear and present danger to public peace and order, that part of Penal Code Section 415 in question here makes punishable only wilful and mali-

cious conduct that is violent and endangers public safety and order or that creates a clear and present danger that others will engage in violence of that nature."

Appellee contends that the conduct of appellant was "offensive" as that term has been interpreted by the California courts. Any act or conduct which disturbs the peace and quiet by inciting violence or which tends to provoke others to break the peace constitutes disturbance of the peace [*People v. Anderson*, (1931) 117 Cal. App. Supp. 763, 767, 1 P. 2d 64]. It is not necessary that any act have in itself any element of violence in order to constitute a breach of peace [*People v. Green*, (1965) 234 Cal. App. 2d Supp. 871, 873, 44 Cal. Rptr. 438; certiorari denied (1966) 382 U.S. 983, 15 L. Ed. 2d 480].

In *Cohen* (A. 28-29) the court declared that "if it can be reasonably anticipated that certain conduct will cause others to disturb the peace, wilfully and maliciously engaging in such behavior constitutes a disturbance of the peace. Thus, under Section 415 a person who engages in offensive behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace and quiet is guilty of disturbing the peace although his own conduct, while offensive was not in itself violent."

The appellant's acts constituted the type of offensive conduct prohibited by California Penal Code Section 415 in that it had a tendency to incite others to violent behavior or to disturb the peace. It is not a valid defense to a charge of disturbing the peace that the appellant's conduct was not violent or tumultuous if it was foreseeable that his acts would tend to cause

others to commit violent acts or disturb the peace. One may be guilty of the offense of breach of the peace if he commits acts likely to provoke violence or disturbance of good order, even though no such eventuality be intended.

Appellant's actions in wearing the jacket was "offensive conduct" within the purview of California Penal Code Section 415.

The California Court of Appeal declared (A. 31):

> "The words 'offensive conduct' have stood the test of time and have a commonly accepted meaning. The term 'offensive' has a well established meaning when used in connection with words which can cause a breach of the peace. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572, the United States Supreme Court quoted with approval the following language from the opinion of the Supreme Court of New Hampshire in *State v. Chaplinsky*, 91 N. H. 310, 18 A. 2d 754: 'The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee

to a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker — including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.'

"As modified by case law the only 'offensive' conduct prohibited by Section 415 is that which incites violence or has a tendency to incite others to violence or a breach of the peace. [*Cf. People v. Davis,* 68 Cal. 2d 481, 486-487.] This standard makes clear for triers of fact the nature of the forbidden conduct, and eliminates prosecutions or convictions for conduct which is merely offensive."

In *State v. Zwicker,* (1969) 41 Wis. 497, 508-510, 164 N. W. 2d 512, appeal dismissed (1969) 24 L. Ed. 2d 147, the Supreme Court of Wisconsin stated that certain activities are outside the protection of the First and Fourteenth Amendments and general regulatory statutes, not intended to control the content of speech, but incidentally limiting its unfettered exercise, are permissible when they have been found justified by subordinating valid governmental interests. Only conduct that unreasonably offends the sense of decency or propriety of the community is included in "disorderly conduct."

Appellee contends that California Penal Code Section 415 is constitutional and is neither overbroad, vague nor uncertain. Men of common intelligence need not guess at the meaning nor differ as to the application of the statute. (*Cameron v. Johnson,* (1968) 390 U.S. 611, 616, 20 L. Ed. 2d 182, 187).

III.

Appellant's Conviction Is Not a Violation of the First and Fourteenth Amendments.

Facts.

On April 26, 1968, the appellant was observed in the corridor of the Los Angeles County Courthouse. The appellant was outside of Division 20 of the Los Angeles Municipal Court. He was wearing a jacket bearing various symbols and slogans including the phrase "Fuck the Draft." Women and children were present in the corridor. The appellant then entered the Division 20 courtroom, where he removed his jacket and held it folded over his arm (A. 18). The Appellant admitted wearing the jacket. Though he had not written the words, the appellant was aware of the fact the phrase "Fuck the Draft" was on the jacket. By wearing the jacket, the public was made aware of the depth of feeling against the draft shared by the appellant and his friends (A. 19-20). The appellant was convicted of violating California Penal Code Section 415.

Statute.

Every person who maliciously and wilfully disturbs the peace or quiet of any neighborhood or person . . . by tumultuous or offensive conduct . . . is guilty of a misdemeanor. . . .

California Penal Code Section 415.

ARGUMENT.

Appellee contends that people who want to propagandize protests or views have no constitutional right to do so whenever and however and wherever they please (*Adderly v. Florida,* (1966) 385 U.S. 39, 47, 17 L. Ed. 2d 149, 156). First Amendment provisions are not absolute, but must be balanced against other public interests (*American Communications Ass'n. v. Douds,* (1949) 339 U.S. 382, 399, 94 L. Ed. 925, 944; *Breard v. Alexandria,* (1951) 341 U.S. 622, 642, 95 L. Ed. 1233, 1248).

In *Walker v. Birmingham,* (1967) 388 U.S. 307, 316, 18 L. Ed. 2d 1210, 1217, this Court declared that "we have consistently recognized the strong interest of state and local governments in regulating the use of their streets and other public places. . . ." This Court emphatically rejected the notion "that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. . . ."

In *United States v. O'Brien,* (1968) 391 U.S. 367, 376 20 L. Ed. 2d 672, 679, this Court refused to accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. The California Court of Appeal determined that appellant's conduct

consisted of "speech" and "nonspeech" elements. The "nonspeech" element consisted of walking through a public building with the premeditated intent of attracting the attention of others to the message on his jacket (A. 33).

Freedom of speech is not unconstitutionally abridged by legislation making a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed (*Cox v. Louisiana,* (1965) 379 U.S. 536, 555, 13 L. Ed. 2d 471, 484; *People v. Davis,* (1968) 68 Cal. 2d 481, 486, 67 Cal. Rptr. 547, 439 P. 2d 651).

The appellant engaged in "offensive conduct" in the Los Angeles County Courthouse, a building open to the public. From time immemorial streets, sidewalks and parks have been held in trust for the use of the public and have been used for purposes of assembly, communicating thoughts and discussing political questions (*Hague v. Committee for Industrial Organization,* (1939) 307 U.S. 496, 515, 83 L. Ed. 1423, 1436). City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control (*Kovacs v. Cooper,* (1949) 336 U.S. 77, 87, 93 L. Ed. 513, 522).

The conduct of the appellant involved a substantial invasion of the rights of other persons who were present in the Los Angeles County Courthouse and, therefore, was not immunized by the constitutional guarantee of freedom of speech (*Tinker v. Des Moines Community School District,* (1969) 393 U.S. 503, 513, 21 L. Ed. 2d 731, 741). The right to speak one's mind would often be an empty privilege in a place and at a

time beyond the protecting hand of the guardians of public order.

Appellee contends that the children, women and men present in the Los Angeles County Courthouse corridor were forced to observe appellant's conduct. These people were in a similar position as the "unwilling listener" in *Kovacs v. Cooper, supra.* This Court in *Kovacs* recognized that "the unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it . . . on the street [the unwilling listener] is practically helpless to escape this interference with his privacy. . . ."

Persons in the Los Angeles County Courthouse were helpless to escape confrontation with appellant's protest. Appellant's opposition to the draft tends "to force public confrontation with the potentially offensive aspects of the" jacket. The "brazenness" of the protest ("Fuck the Draft") "heightens the offensiveness of the [jacket] to those who are offended by such material." (*Ginzburg v. United States,* (1966) 383 U.S. 463, 470, 16 L. Ed. 2d 31, 38).

Though stated in a different context the words of this Court appear applicable here:

> "Nothing in the Contitution compels us to listen to or view any unwanted communication, whatever its merit . . . [individuals do not have a] right to communicate offensively with another. . . . If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even 'good' ideas on an unwilling recipient." [*Rowan v. United States Post Office,* (1970) 397 U.S. 728, 25 L. Ed. 2d 736, 743-744].

Prohibition of appellant's offensive conduct does not abridge constitutional liberty since such activity bears no necessary relationship to the freedom to distribute information or opinion [*Schneider v. Irvington*, (1939) 308 U.S. 147, 161, 84 L. Ed. 155, 164]. Appellant's rights under the First Amendment were not violated when the appellant engaged in offensive conduct that could result in a breach of the peace.

One may be guilty of the common law offense of breach of the peace if he makes statements likely to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communiation or information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument [*Cantwell v. Connecticut*, (1940) 310 U.S. 296, 309-310, 84 L. Ed. 1213, 1221].

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, and libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an

immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality [*Chaplinsky v. New Hampshire*, (1942) 315 U.S. 568, 571-572, 86 L. Ed. 1031, 1035].

Appellant argues that "fuck" is a word society tolerates and often rewards when used in the arts and even in the mass media. Appellee contends that merely because the word appears in "Best Sellers" or in "constitutionally protected" books does not justify the public display of the phrase "Fuck the Draft." Individuals are free to determine whether they will read the books which contain language similar to that used by appellant.

However, the children, women and men present in the corridor of the Los Angeles County Courthouse were *not* free to avoid the appellant's jacket. These individuals were a "captive audience" forced to observe appellant's offensive conduct. Husbands and fathers might have breached the peace in an attempt to protect their wives and children from being confronted by the appellant's jacket.

Parents have the obligation to protect their children from the language used by appellant. While the well-being of its children, is a subject within a state's constitutional power to regulate, "it is cardinal with (this Court) that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." [*Ginsberg v. New*

York, (1968) 390 U.S. 629, 639, 20 L. Ed. 2d 195, 203-204].

If parents have the right and duty to keep "offensive material" out of reach of their children at home, should not parents who object to the public display of appellant's protest before their children be entitled to the State's protection? In *Prince v. Massachusetts,* (1944) 321 U.S. 158, 165, 88 L. Ed. 645, 652 this Court recognized that the State has an interest to protect the welfare of children and to see that they are "safeguarded from abuses" which might prevent their "growth into free and independent well-developed men and citizens." The State of California has the right to prevent the public display of appellant's jacket before children, women or men.

If "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," [*Schenck v. United States,* (1919) 249 U.S. 47, 52, 63 L. Ed. 470, 473], appellee contends that certainly an individual may not wear a jacket like appellant's in a courthouse or on a public street. The wearing of the jacket would certainly provoke a husband who is with his wife, a parent who is with a child, or just the average citizen who does not use the term "fuck the draft" and is offended by the public display of such a term.

Allowing the broadest scope to the language and purpose of the First Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. The First Amendment, while prohibiting legislation against free speech as such, cannot have been and obviously was not, intended to give immunity for every possible use of the language.

The First Amendment does not allow the display of appellant's jacket in a public place.

In *Feiner v. New York*, (1951) 340 U.S. 315, 320, 95 L. Ed. 295, 300 this court respected the interest of a community in maintaining peace and order on its streets. Argument would appear unnecessary to demonstrate that the protest used by the appellant is likely to provoke the average person to retaliation, and thereby cause a breach of the peace.

Conclusion.

This Court has determined that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." [*Terminiello v. Chicago*, (1949) 337 U.S. 1, 4, 93 L. Ed. 1131, 1134].

While freedom of speech is in a preferred position, appellee does not believe the "function of free speech" is served by the display of a jacket bearing the phrase "Fuck the Draft" in protest over the war in Viet Nam.

If appellant's form of protest is deemed constitutionally protected, then one need merely imagine the type of signs that will be publicly displayed against private citizens. ("Fuck Catholics"; "Fuck Negroes"; "Fuck Whites"; "Fuck Jews";—signs carried in protest by opponents of these "groups"); against public institutions (a "Fuck the United States Congress" sign in protest over enactments of the National Legisla-

ture); or against public officials (a "Fuck Nixon" sign carried by an opponent of the war policies of the President of the United States; a "Fuck the Justices of the United States Supreme Court" sign displayed in protest of decisions rendered by this Honorable Court).

The display of such signs in a public place would tend to incite an immediate breach of the peace by observers of the sign. "Such [signs] are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (*Chaplinsky v. New Hampshire*, (1942) 315 U.S. 568, 572, 86 L. Ed. 1031, 1035).

In *Schacht v. United States*, (1970) 398 U.S. 58, 26 L. Ed. 2d 44, 48, this Court stated that everyone in our country enjoys a constitutional right to criticize the government. However, the rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.

Appellant's conviction was not a violation of his right of free speech. Appellant's form of protest was so inherently inflammatory as to come within the class of words which are likely to provoke the average person to retaliation and thereby cause a breach of the peace. In the view of the California Court of Appeal, the appellant's "conduct in ths case went beyond the permissive ambit of the First Amendment's protection as

circumscribed in" *Cantwell v. Connecticut,* (1940) 310 U.S. 296, 84 L. Ed. 1213, *Chaplinsky v. New Hampshire,* (1942) 315 U.S. 568, 86 L. Ed. 1031 and *Beauharnais v. Illinois,* (1952) 343 U.S. 250, 96 L. Ed. 919.

Appellant's conviction for "offensive conduct" in no way abridges or denies his right to protest the draft. In light of the firmly established principle that an individual does not have the constitutional right to propagandize protests whenever, however, and wherever he pleases, appellee contends that the conviction was not a violation of the First and Fourteenth Amendments. No one has the right to express his views by means of printing lewd and vulgar language which is likely to cause others to breach the peace to protect women and children from exposure to such language.

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

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